No. 80-1002

Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Petitioners,

-against-

AMY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY in their own right,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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STATUTES INVOLVED

In addition to section 615(e)(2) of the Education of the Handicapped Act, as amended by the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1415(e)(2), this case was initiated under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the pertinent regulations promulgated thereunder, 45 CFR Part 84, Subparts A and D; and 42 U.S.C. § 1983.

STATEMENT OF THE CASE

The facts of this case, as set forth in the petition for certiorari, are so inaccurate and set forth so selectively that they bear no relation to reality.[1] The facts are adequately

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[1] To cite just one example, there is no such thing as "a discrete sound amplification device." (Petition, page 4).

set forth in the opinion of the district court, 483 F. Supp. 528.[2]

The statements made in the petition for certiorari concerning the contents and substance of the circuit court and district court decisions are replete with distortions, inaccuracies, and untruths.[3] It is respectfully suggested that this Court refer to the decisions themselves.

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[2] It is respectfully suggested that this Court refer to the reported opinion of the district court, inasmuch as Appendix C of the petition for certiorari omits part of that opinion and contains typographical errors.

[3] To cite just one example, Judge Broderick did not find that local school districts must provide "an education which enables the handicapped child to achieve his full potential." (Petition, pages 12-13).

REASONS FOR REFUSING TO REVIEW THIS CASE

1. THERE IS NO CONFLICT AMONG THE CIRCUITS.

2. THE COURT OF APPEALS HAS NOT DECIDED A FEDERAL QUESTION IN CONFLICT WITH A STATE COURT OF LAST RESORT.

Section 4402(2)(a) of the Education Law of the State of New York provides that services shall be made available to a handicapped child in accordance with the child's individual needs.

The New York Court of Appeals has held that Article 11, Section 1 of the New York State Constitution assures that each handicapped child will be provided with a free public education, including the services necessary for that educa-

tion to be meaningful to the child. Matter of Levy, 38 N.Y.2d 653, 382 N.Y.S. 2d 13 (1976).

At the oral argument before the court of appeals, each petitioner conceded that the Regulations of the Commissioner of Education of the State of New York[4] are broad enough to encompass the provisions of an interpreter for a deaf child.[5] In their petition for certiorari, the petitioners concede once again that the regulations are broad enough to encompass the provisions of an interpreter for a deaf child when the child's unique needs so require. (Petition, page 26).[6]

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[4] Section 200.4(c)(1) of the regulations, which the petitioners have omitted from their petition, provides that: "The formation of resource programs as instructional service options shall depend upon the nature of the child's capabilities and individual needs."

[5] Oral Argument before the Court of Appeals

Thus, Judge Broderick was called upon to, and did, apply the State implementing standards, in order to provide services to Amy Rowley because of the unique needs occasioned by her deafness in order to furnish her with a free appropriate public education.[7] This case never has

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("TCCA"), pages 7-8, 35-36. See also, petitioner school board's memorandum of law in response to respondents' memorandum of law in opposition to the petitioner's motion to dismiss under Rule 12(b), page 5; and petitioner school board's trial memorandum of law, page 15.

In the district court, neither petitioner pleaded or argued that the regulations preclude the provision of a sign language interpreter for a deaf child.

[6] Indeed, the plan submitted to the United States Commissioner of Education under 20 U.S.C. § 1413 for school year 1978-79 specifically envisions the use of sign language in the education of deaf children. Helping Children With Handicapping Conditions in New York State, 1978-79, page 34.

[7] If, as petitioners claim (Petition, page 24), they applied only section 200.4(d)(4) of the Regulations of the Commissioner of Education, disregarding section 200.4(c)(1) (note 4, supra) and section 200.4(a)(2) ("Unless

and never will raise anything more than a question of fact, as recognized by the attorney for the petitioner school board (TCCA 43). On the evidence presented, it would have been a virtual impossibility for any reasonable person to find against the respondents.[8]

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the student's handicapping condition requires special classes, the student shall be educated in regular classes with appropriate supportive supplementary assistance."), then it was the petitioners, not the district court, who based their determination on a category of handicapping condition (deafness), rather than on Amy Rowley's unique needs.

Respondents' (plaintiffs') Exhibit No. 23, introduced at the hearing, shows clearly that the school board furnished Amy with what it deemed to be the minimally acceptable educational program provided for in the regulations for a deaf child. The petitioners failed to present that exhibit to the court of appeals; it was presented separately by the attorney for the respondents. Chernack v. Radlo, 331 F.2d 170, 171 (First Circuit, 1964).

8 "The policy underlying the 'two-court' rule is obvious. This court possesses no empirical expertise to set against the careful and reasonable conclusions of lower courts on purely factual issues. When, as here, resolution

3. THE PETITIONERS HAVE NOT RAISED ANY ISSUES THAT SHOULD BE SETTLED BY THIS COURT.

The petitioners appear to contest the standard for "free appropriate public education" set forth in the opinion

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of the disputed factual issues turns largely on an assessment of the relative credibility of witnesses whose testimonial demeanor was observed only by the trial court, the rule has particular force . . . " Berenyi v. District Director, Immigration and Naturalization Service, 385 U.S. 630, 636, 87 S.Ct. 666, 17 L.Ed.2d 656 (1967). See also, Workman v. Mayor, Etc., City of New York, 179 U.S. 552, 21 S.Ct. 212, 45 L.Ed. 314 (1900); International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42, note 7, 99 S.Ct. 2121, 60 L.Ed.2d 698 (1979). The rule is of even greater importance in this case because four of the witnesses for the respondents who are deaf, including Mr. and Mrs. Rowley, testified using total communication, which is visual in nature. Per force, Judge Broderick, and only Judge Broderick, was able to assimilate that testimony.

of the district court, [9]but no where do they say it is wrong. The district court's standard is bottomed in "equal educational opportunity." Both the petitioner Commissioner (TCCA 27, 30) and the petitioner school board (post trial brief in the district court, page 24) concede that handicapped children are entitled to an equal educational opportunity.[10]

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[9] During the oral argument before the court of appeals, the attorney for the school board stated:

> The District court's standard was that each handicapped child be given an opportunity to achieve full potential commensurate with the opportunity given to other children. The District Court went on -- because I frankly think that we have no great disagreement with that standard as a standard per se . . . (TCCA 33).

[10] The petitioners have omitted from their petition the Findings and Purpose section of the Education of the Handicapped Act, as amended by the Education for All Handicapped Children Act of 1975. That section is set out:

The petitioners chide Judge Broderick for formulating a definition of "free appropriate public education"

Section 601. Findings and Purpose.

"(a) This title may be cited as the 'Education of the Handicapped Act'.

"(b) The Congress finds that-

"(1) there are more than eight million handicapped children in the United States today;

"(2) the special educational needs of such children are not being fully met;

"(3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

"(4) one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

"(5) there are many handicapped children throughout the United States participating in regular school programs whose handicaps prevent them from having a successful educational experience because their handicaps are undetected;

"(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at a great distance from

when there is a definition set out in the Education of the Handicapped Act, 20 U.S.C. § 1401(18). But that is

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their residence and at their own expense;

"(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of handicapped children;

"(8) State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children; and

"(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

"(c) It is the purpose of this Act [this chapter] to assure that all handicapped children have available to them, within the time periods specified in section 612(2)(B) a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped

not a functional definition; it provides no guidance to judges in their consideration of controversies involving "the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education." 20 U.S.C. § 1415(b)(1)(C). Cf. Battle v. Commonwealth of Pennsylvania, 629 F.2d 269, 276 (Third Circuit, 1980). Thus

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children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children."

Judge Broderick was obligated to formulate a standard based upon the legislative history of the Education for All Handicapped Children Act of 1975, Public Law 94-142, and the standard so formulated is in complete accord with the Act and its legislative history.[11]

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[11] Inasmuch as these papers are not supposed to review the merits of this controversy, it is respectfully suggested that this Court refer to the respondents' (plaintiffs-appellees') brief to the court of appeals. pages 15 to 36.

It is interesting to note that neither petitioner so much as suggested that there existed a statutory definition of free appropriate public education prior to their briefs filed in the court of appeals. Indeed, each petitioner offered material to assist Judge Broderick in the formulation of the proper standard (at page 18 of its trial memorandum, the petitioner school board set forth the definition of "appropriate education" established in the regulations promulgated under section 504 of the Rehabilitation Act of 1973, 45 CFR § 84.33(b)).

The petitioners question Judge Broderick's consideration of expert testimony. A Federal judge is called upon to hear and decide

controversies covering the entire spectrum of human activity. No judge, not anyone, can be so well versed that he is able to render judicious decisions on all matters before him without the presentation of expert testimony to acquaint him with the field in which he is called upon to decide.[12] The respondents called five experts for that purpose -- four of whom had and have personal knowledge of Amy Rowley.[13] The

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12 " . . . [I]t is the very purpose of expert testimony to assist the trier of the facts (in this case, a court sitting without a jury) to understand, evaluate and decide the complex evidential materials in the case." United States v. R.J. Reynolds Tobacco Co., 416 F. Supp. 313, 315 (DNJ, 1976).

13 Mrs. Rowley, Amy's mother, is a certified teacher of the deaf with six years experience. She testified to and submitted documentary material on her observation of Amy in class over a one week period.

petitioners called three experts for that purpose. In addition, Judge Broderick received two parent initiated independent educational evaluations (20 U.S.C. § 1415(b)(1)(A) and 45 CFR § 121a.503(c)) prepared by two experts in the education of deaf children. Having reviewed and assimiliated that expert testimony,

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Mr. Taras B. Denis, an Administrator at the New York School for the Deaf, testified to the fact that he has known Amy all her life.

Dr. Ann Barbara Kligerman, Director of the Speech and Hearing Clinic of the Westchester County Medical Center, testified that she has been testing Amy's hearing periodically for at least five years.

Dr. Martin L.A. Sternberg, Professor at the New York University Deafness Research and Training Center, testified that he spent several hours with Amy during the spring of 1979 to gauge her communication skills.

Judge Broderick applied the standard mandated by the Education for the Handicapped Act. He determined that, based upon Amy's upbringing, her parents' wishes,[14] and her level of comprehension of oral communications with and without the use of total communication, Amy had proved by a preponderance of the evidence presented her right to the relief requested in her complaint.

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[14] An individualized education program, 20 U.S.C. § 1401(19), is a written statement, developed by, among others, the child's parents, 483 F. Supp. 530, setting forth ". . . the specific educational services to be provided to such child. . . "

The petitioners seek to raise the issue of cost. That is a novel, self-serving, speculative issue, not supported by any evidence presented below, contrary to the purpose and legislative history of the 1975 Act (Senate Report No. 94-168, page 8, reprinted in 1975 United States Code Congressional and Administrative News, page 1432), and based upon a misunderstanding or misreading of the opinions below. The April 10, 1979 decision of the Commissioner of Education does not indicate in any way that cost is a relevant consideration in the provision of a free appropriate public education. During the final pre-trial conference, the attorney for the petitioner school board told Judge Broderick that cost is not a factor in this litigation (a point

reiterated at the pre-argument conference conducted by Staff Counsel, pursuant to section 5 of the Civil Action Management Plan of the Court of Appeals for the Second Circuit). Neither petitioner sought to introduce any evidence relevant to cost at the hearing held on September 26, 27, and 28 and October 4, 1979. Neither petitioner referred to cost in its trial or post trial brief. Neither petitioner referred to cost in the court of appeals. "The fact that this asserted basis of liability is so obviously an afterthought may be some indication of its merit, but since it was neither pleaded, argued, nor briefed either in the District Court or the Court of Appeals, we will not consider it." Miree v. DeKalb County, Georgia, 433 U.S. 25, 33-34,

97 S.Ct. 2490, 53 L.Ed.2d 557 (1977). See also, Duignan v. United States, 274 U.S. 195, 200, 47 S.Ct. 566, 71 L.Ed. 996 (1927); United States v. Lovasco, 431 U.S. 783, 788 note 1, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977); and Lawn v. United States, 355 U.S. 339, 362 note 16, 78 S.Ct. 311, 2 L.Ed.2d 321 (1958). The reason for this rule is obvious. This is a court of review; it reviews only issues raised in courts below. Were that not true, every unsuccessful litigant would do what the petitioners here seek to do -- at every step of the appellate process, they would conjure up new arguments as substitutes for or additions to the arguments found unpersuasive in courts below. The petitioners seek not review of the lower court opinions, but relitigation

of this case.

In the final analysis, what the petitioners have argued is that they, and not Amy's parents, should determine how Amy is to be raised (petitioner school board's brief to the court of appeals, page 25). That is contrary to our culture, Federal statutory law,[15] and Federal common law.[16]

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15 Section 101(3) of the Department of Education Organization Act, 20 U.S.C. § 3401(3), states:

> "[P]arents have the primary responsibility for the education of their children, and States, localities, and private institutions have the primary responsibility for supporting that parental role."

16 See Meyer v. Nebraska, 262 U.S. 390, 399-403, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 534-535, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting).

Despite the oft-repeated admonishment that parties ought not to seek appellate review solely because they dislike a decision, where there is no substantial controversy of a legal nature, the petitioners have appealed the decision of the district court relentlessly, notwithstanding that they have not raised a substantial legal question.

That assertion can only be termed silly in this case, where both parents are themselves deaf, both are, nevertheless, college graduates and professionals, and one is an experienced certified teacher of the deaf (see note 14, supra).

4. RESPONDENTS EXHAUSTED ALL ADMINISTRATIVE REMEDIES PRIOR TO INITIATING SUIT.

The petitioners concede that the district court had jurisdiction to review Amy's educational program for school year 1978-79. However, they[17] argue that upon the completion of school year 1978-79, the matter became moot and that the court could

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17 At no prior stage in the proceedings has the petitioner school board contested the jurisdiction of the district court. Indeed, at the commencement of the hearing in this case, the attorney for the school board stated:

> It makes little sense to me to have to go back, to go through the Committee hearings -- well, the Committee has already made its determination -- to go through the independent hearing officer, to go through the review of the Commissioner when basically the facts haven't changed. That is a conclusion, and again, that is something that your Honor will have to determine as a result of this hearing. But it is my feeling that the facts haven't changed

not have jurisdiction under 20 U.S.C. § 1415(e)(2) for school year 1979-80 until all administrative procedures set forth in section 1415 had been completed with relation to Amy's IEP for school year 1979-80. Inasmuch as those procedures would not be completed until after the end of school year 1979-80, by the time of their completion the matter would again be moot and it would be necessary to start again during school year 1980-81, ad infinitum. In essence, the petitioners argue that the procedural

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substantially. Transcript ("T"), page 17.

During the oral argument before the court of appeals, the attorney for the school board conceded that the district court has jurisdiction to grant the relief requested and granted. TCCA 41-42.

safeguards established to protect the rights of parents of handicapped children, which culminate in judicial review, effectively preclude such review. It is hornbook law that courts shall not interpret Congressional statutory language in such a manner as to render it meaningless and ineffective. United States v. Monasche, 348 U.S. 528, 538-539, 75 S.Ct. 513, 99 L.Ed. 615 (1955); Bird v. United States, 187 U.S. 118, 124, 23 S.Ct. 42, 47 L.Ed. 100 (1902); Federal Trade Commission v. Manager, Retail Credit Co., Miami Branch Office, 515 F.2d 988, 994-995 (District of Columbia Circuit, 1975).

Amy Rowley is deaf; barring the discovery by medical science of a cure for deafness, she will be deaf for the rest of her life. Her parents

will object to any arrangement, in any school year, that fails to provide her with the services necessary to enable her to understand what is said in her classroom, despite her deafness. Thus, administrative procedures and judicial review in any school year would involve consideration of the exact same question: What services must Amy receive to compensate for her deafness?

Were the argument of the petitioners to be adopted, no court would ever be able to review Amy's IEP for any school year. Where jurisdiction exists, as it does here, it does not terminate when there is a likelihood that the same situation will be repeated again in the future. The well recognized exception to the mootness doctrine, as enunciated by this Court,

assures that an aggrieved individual will be entitled to his day in court. Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 514-515, 31 S.Ct. 279, 55 L.Ed. 310 (1911); Nebraska Press Association v. Stuart, 427 U.S. 539, 546, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976); Roe v. Wade, 410 U.S. 113, 123-125, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

The Act, 20 U.S.C. § 1415(e)(2), grants jurisdiction to Federal district courtswith respect to the original complaint filed thereunder "and all matters relating thereto" (Senate Conference Report No. 94-455, page 50, reprinted in 1975 United States Code Congressional and Administrative News, page 1503; and 121 Congressional Record S 37416, November 19, 1975), and to grant any

appropriate relief. By the passage of the 1975 Act, Congress sought to assure that the parents of disabled children would not have to go to court continually to protect the rights of their children, not that those parents would be denied access entirely to the courts of this country. Senate Report No. 94-168, page 9, reprinted in 1975 United States Code Congressional and Administrative News, page 1433.

Even assuming, arguendo, the correctness of the argument of the petitioners, it is a recognized principle of law that a party need not exhaust administrative remedies when such action would be futile. See, for example, Porter County Chapter of the Izaak Walton League of America, Inc. v. Costle, 571 F.2d 359, 363 (Seventh Circuit, 1978).

During the Senate Floor debate on the conference report on S. 6 of the 94th Congress, the Education for All Handicapped Children Act, Senator Williams, the Floor Manager, said:

> Mr. President, with regard to complaints, I want to underscore that the exhaustion of administrative procedures established under this part should not be required for any individual complainant filing a judicial action in cases where such exhaustion would be futile either as a legal or practical matter . . .
> 121 Congressional Record S 37416, November 19, 1975.

In this case, the Commissioner of Education has taken an adversary position, he has compromised his office, solely for the purpose of denying the plaintiffs the relief they seek. Were the Commissioner to review this matter for a second time, his decision would be a foregone conclusion.

The court of appeals specifically

rejected the petitioner Commissioner's argument of lack of jurisdiction.

5. THE COURT OF APPEALS DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The judges of the court of appeals acted in accordance with their responsibilities under Canon 3(A)(5) of the Code of Judicial Conduct.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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